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No. 79-1365

In the Supreme Court of the United States

OCTOBER TERM, 1979

DEPARTMENT OF ENERGY AND CHARLES W. DUNCAN, JR., SECRETARY OF ENERGY, PETITIONERS

v.

MOBIL OIL CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONERS

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INDEX

CITATIONS

Cases:	Page
American Iron and Steel Institute v. *EPA*, 568 F.2d 284	6
American Trucking Association v. *Frisco Transportation Co.*, 358 U.S. 133	2-3
BASF Wyandotte Corp. v. *Costle*, 598 F. 2d 637, cert. denied sub nom. *Eli Lilly and Co.* v. *Costle*, No. 79-485 (Feb. 19, 1980)	6
California v. *Simon*, 504 F. 2d 430, cert. denied, 419 U.S. 1021	4
Chorine Institute, Inc. v. *OSHA*, 613 F. 2d 120	3, 4
International Harvester Co. v. *Ruckelshaus*, 478 F. 2d 615	6
South Terminal Corp. v. *Environmental Protection Agency*, 504 F. 2d 646	6
Weyerhauser Co. v. *Costle*, 590 F. 2d 1011	6
Statute and regulation	
5 U.S.C. 553	2, 4
10 C.F.R. 212.83	10, 11, 12
Miscellaneous:	
39 Fed. Reg. (1974):	
P. 15139	8, 9
P. 32718	10
P. 32720	10
P. 32722	10, 11
P. 32723	11

Miscellaneous—Continued

	Page
P. 32724	11
P. 32727	10
Pp. 32727-32729	11
P. 32728	10
P. 39259	12
P. 42368	12
Pp. 42370-42371	12

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1. Respondent contends (Br. in Opp. 9) that "[c]ontrary to the impression created by petitioners, the decision below did not strike down the agency's cost-allocation formula." The decision below, respondent suggests (Br. in Opp. 9-10), merely voided an amendment to the cost-allocation formula "but otherwise left the regulatory system and the cost-allo-

cation formula intact." As we correctly stressed in our petition (at page 2), however, the amendment (and its subsequent repromulgations) at issue in this case has been at the core of the petroleum-refiner price-control regulations since they were first promulgated. It is the regulatory provision by which costs have been allocated between covered and decontrolled products since 1974. In light of the escalating costs of crude oil since that time, the allocation of such increased costs between covered products and decontrolled products has been a critical determinant of the maximum allowable price under the regulations. Although respondent questions (Br. in Opp. 28-31) the precise amount of the industry-wide sums at stake, it does not dispute that those sums are vast.

2. We contended in the petition that where an agency issues a rule after notice and comment and then discovers that the rule inadvertently expresses a policy that the agency had not intended to adopt, the agency may issue a conforming amendment without commencing new rulemaking procedures or inviting new comment under 5 U.S.C. 553, at least where the amendment falls within the subject on which comment was originally invited and the amendment is promulgated before anyone places reasonable reliance on the original rule. Respondent's various objections to this contention are insubstantial.

a. Respondent contends (Br. in Opp. 26) that *American Trucking Association* v. *Frisco Transportation Co.*, 358 U.S. 133 (1958), is inapposite because the agency in that case provided notice and a hearing to the interested parties before correcting its final certificate. However, the relevant holding of *American Trucking* for present purposes is that the original ICC proceeding was *not* terminated by the issuance of the final certificate, despite a statutory provision that appeared to make "the issuance of a certificate the final step in the administrative process" (358 U.S. at 146), and that the proceeding continued at least for the purpose of correcting unintended policies expressed inadvertently in the final certificate. It is true that in *American Trucking* the agency gave notice and a hearing prior to making the corrections and that the Court's opinion (*id.* at 144-145) suggests that such corrections must be preceded by those procedural requisites. But the notice and hearing requirements were relevant in that case only because the agency order followed an adjudication. In rulemaking, by contrast, if the agency provides adequate notice at the outset of the proceeding, there is no further procedural requirement for supplemental notice and comment before each interim step in the proceeding.

Indeed, since the petition in this case was filed, the Fifth Circuit has adopted our view of *American Trucking*. In *Chorine Institute, Inc.* v. *OSHA*, 613 F.2d 120 (5th Cir. 1980), the court of appeals sustained the Secretary of Labor's corrective amendment of an occupational health standard without notice and comment, several years after the standard was

originally adopted, in circumstances where the amendment, by inserting a designating code in the standard that had previously been omitted, offered substantially greater health protection. Citing *American Trucking*, the Fifth Circuit held that "[t]he courts have long recognized that administrative agencies may correct inadvertent, ministerial errors" so long as they are not " 'used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies.' " 613 F.2d at 123. Although *Chorine Institute* arose (as administrative law cases inevitably will) in a different regulatory setting, it plainly supports our argument that under 5 U.S.C. 553 an agency may correct regulations expressing policies it did not intend to adopt without commencing new rulemaking proceedings.

b. Respondent also contends (Br. in Opp. 27) that the petition "seriously misstated" the holding of *California* v. *Simon*, 504 F.2d 430 (T.E.C.A.), cert. denied, 419 U.S. 1021 (1974), by stating that "*Simon* specifically held that the January 14 regulation contemplated follow-up clarifying amendments and that a subsequent amendment was part of the same rulemaking proceeding so that the agency did not have to provide new notice and opportunity for comment" (see Pet. 17 n.13). Our statement is correct. *Simon* held (504 F.2d at 436-439) that after issuing the January 14 regulations (the very regulations in question here) the agency was entitled on February 21 to reverse—without additional notice and comment—even a deliberate policy choice expressed in the original regulations.

Both promulgations were part of the same rulemaking proceedings. In October 1973 the agency proposed to revoke an exemption for state and local governments. In December 1973 the agency proposed to retain the exemption and did so in the January 14 regulations. On February 21, 1974, the agency reversed that decision and revoked the exemption. *Simon* held that the January 14 regulations did not terminate the rulemaking proceedings with respect to the exemption and noted that the agency expressly stated in the January 14 preamble that "a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will surely arise" (504 F.2d at 438). Therefore, said the court, no new notice and comment was required for the February 21 action.

c. Even if the petition correctly stated the governing principle, respondent contends (Br. in Opp. 11) that it is factually inapplicable in this case because the "rule adopted on April 30 was not proposed in December 1973." This ignores the fact that, in order to adopt a rule under the APA, an agency need not adopt the precise rule as originally proposed; the final rule need only be a logical outgrowth of the pro-

posed rule.[1] Here, the December notice proposed to carry forward the Cost of Living Council volumetric cost-apportionment formula. The April 30 amendment did so with only an appropriate modification to cancel the indirect effect on the V-factor denominator caused by its use of the term "covered products" and the slightly narrower scope of that term occasioned by the expiration of the Economic Stabilization Act. Inasmuch as these considerations were publicly known at all relevant times, the April 30 amendment was plainly a logical outgrowth of the December 1973 proposal.

In a related argument, respondent insists (Br. in Opp. 12-13) that the April 3 amendment was not the result of inadvertence, that the first time a policy choice on the matter had to be made was April 3, and that on that date the agency consciously adopted a policy that "no costs are properly attributable to refinery residue." Therefore, respondent concludes (Br. in Opp. 13) that on April 30 the agency consciously made a different "policy decision" to attribute "costs to the decontrolled products on a volumetric basis." Thus, in respondent's view, a new round of notice

[1] See *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637, 642 (1st Cir. 1979), cert. denied sub nom. *Eli Lilly and Co.* v. *Costle*, No. 79-485 (Feb. 19, 1980); *Weyerhauser Co.* v. *Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978); *American Iron and Steel Institute* v. *EPA*, 568 F.2d 284, 293 (3d Cir. 1977); *South Terminal Corp.* v. *Environmental Protection Agency*, 504 F.2d 646, 659 (1st Cir. 1974); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973).

and comment was required prior to the April 30 amendment.

This argument is far fetched for a number of reasons. To begin with, as mentioned above, the policy choice concerning the continuation of the volumetric cost apportionment formula under the EPAA first arose in December 1973, not on April 3, 1974. Second, the April 3 amendment was a conscious policy decision only with respect to removing the decontrolled products from the scope of the regulations. Nothing in that amendment suggests an intent to modify the V-factor of the pricing formula. The whole problem that led to the April 30 amendment was that the April 3 amendment did *not* represent a conscious policy choice concerning the V-factor. The April 30 amendment was nothing more than an accurate expression of the policy the agency meant to continue on January 14.[2]

3. The agency's argument is not inconsistent with its position below. The argument challenges the erroneous premise of respondent's own successful

[2] Indeed, had the April 3 amendment expressly or even impliedly modified the V-factor in the way respondent claims, the modification of the V-factor would have been invalid, under respondent's theory, for lack of notice and opportunity to comment. This would have meant that all end products would have remained in the denominator as required by the January 14 formula (and as the agency intended all along). Conversely, if the formula impliedly adopted in the April 3 amendment is valid without notice and comment, so is the formula adopted on April 30. Although our petition (at page 18 n.13) pointed out this fallacy in respondent's argument, respondent has not answered it.

argument below—that the April 30 amendment was a new rulemaking (and thus that new notice and comment was required).

First, contrary to respondent's contention (Br. in Opp. 24 n.30), the preamble to the April 30 amendment did not state that the amendment was being "enacted *without* prior notice." Instead, it specifically referred to the cost-allocation formula adopted in the January 14 rulemaking, noted the intervening decontrol of the five petroleum products exempted from regulation under the EPAA, and stated that the formula's denominator was being revised to include "all products produced from crude oil" (39 Fed. Reg. 15139 (1974)). Because of the need to "provide immediate guidance and information," the agency determined that "normal rulemaking procedure is impracticable and that good cause exists for making these amendments effective in less than 30 days" (*ibid.*). Thus, not only was the public notified of the subject matter of the rulemaking but, in view of the express references to the January rulemaking and the April 3 amendment, the preamble as a whole supports the argument that the April 30 proceeding was a continuation of the earlier rulemaking.

Second, respondent has mischaracterized the agency's answer to the complaint admitting that "the April 30 amendment * * * was enacted without prior notice" (R. 83). Respondent neglects to add that in the same sentence the answer specifically denied the allegation that "neither Mobil nor other interested

parties were afforded an opportunity to comment on the amendment as required by section 4 of the [APA]" (R. 66, 83).

Finally, there is no merit to respondent's claim (Br. in Opp. 24 n.30) that the agency "conceded below that it had not considered all of the statutory objectives." Although it was the agency's position below, as it is here, that in view of their conflicting nature, not all of the statutory objectives were reasonably implicated by the regulations adopted (Br. in Opp. 17; see Pet. 23-24), and that the statutory requirement that the regulation "shall provide for" the statutory objectives "to the maximum extent practicable" is satisfied if the regulations as a whole in fact foster certain of the objectives (Br. in Opp. 18; Pet. 23), at no time did the agency concede that the objectives were not considered in any way. Respondent's discovery in the district court was directed virtually exclusively to whether the agency had considered the impact of the regulation on *unregulated* products, especially petroleum coke. The agency's response indicated that its concern in adopting the April 30 amendment was not for unregulated products but for the prices of regulated products (R. 36, 38-42, 96-97). See also the preamble to the April 30 amendment (39 Fed. Reg. 15139 (1974)). Significantly, the agency argued below that "[w]hen the agency first promulgated the cost-allocation formula following the enactment of the EPAA, the agency considered the relevant factors and concluded that volumetric apportionment best served the regulatory

purposes" (Pet. for Reh. 7). That continues to be the agency's position in this Court. See Pet. 17 n.13.

4. In response to our argument (Pet. 25-27) that subsequent rulemakings cured, at least prospectively, any deficiencies in the April 30 amendment, respondent contends (Br. in Opp. 20-22) that the later rulemakings were "unrelated" and that "petitioners did not and cannot point to any subsequent rulemaking in which the agency considered or allowed public commentary on a proposal relating to the issues involved in the April 30 amendment * * *." This assertion is incorrect. As we mentioned in the petition (at page 10), less than five months after the April 30 amendment, the agency published the "first proposed comprehensive revision" of the refiner price regulations (39 Fed. Reg. 32718 (1974)), in which the agency proposed a number of changes to 10 C.F.R. 212.83.

Specifically, the agency proposed, *inter alia*, to eliminate the "special products" rule (39 Fed. Reg. 32722, 32728 (1974)),[3] to continue the special crude oil cost-allocation rule for propane (*id.* at 32720), to

[3] To accomplish this, the agency proposed to amend the cost-allocation formula so that the numerator of the formula would include the "total volume of all covered products refined * * * from crude petroleum" and the denominator would include the "total volume of all petroleum products refined * * * from crude petroleum including other than covered products" (39 Fed. Reg. 32728 (1974)). Thus, a refiner could allocate all costs attributable to all covered products as a group among covered products as it desired but still would not be allowed to pass through more than this amount in the prices of covered products.

restrict the provisions of 10 C.F.R. 212.83 allowing refiners to carryover, or to "bank," increased product costs not recouped in a current month (39 Fed. Reg. 32723 (1974)), to modify the equal-application rule to permit greater geographic pricing flexibility (*id.* at 32722), and to make clear that the cost of crude oil used in the refinery process as fuel may not be treated as an increased crude oil cost but rather as a nonproduct cost (*id.* at 32724). In addition, the agency stated (*ibid.*):

> The FEA price regulations are complex and interrelated. Many of the specific proposals made herein affect various other aspects of these regulations. The nature and extent of the revisions being proposed in this notice of rulemaking are quite broad. Accordingly, to the extent that parties wish to comment in this proceeding on aspects of the price regulations which have not specifically been addressed in this notice, they are invited to do so.

Moreover, in order to explain the proposed modifications to 10 C.F.R. 212.83 in context, the agency published the entire proposed section, the same provision at issue in this case (39 Fed. Reg. 32727-32729 (1974)). Significantly, respondent filed extensive comments on September 27, 1974—commenting precisely on the very aspect of the V-factor at issue in this case.[4]

[4] Respondent commented in part:

> The proposed regulations allow the pass-through of increased cost of crude petroleum only to the proportion

As a result of the September notice, the agency adopted a number of revisions to 10 C.F.R. 212.83. Most of those revisions were made effective on November 1, 1974. 39 Fed. Reg. 39259 (1974). Additional changes were adopted on November 29, 1974, when the entire section was republished. 39 Fed. Reg. 42368 (1974). Respondent's suggestions notwithstanding, the agency retained the requirement that only increased crude oil costs attributable to regulated products could be recovered in the prices of those products. *Id.* at 42370-42371. Respondent (and the court below) are thus plainly wrong in asserting that any errors in the April 30 rule were not subsequently cured.

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represented by controlled products plus refinery fuel (as a non-product cost). The recovery of increased cost of crude attributable to decontrolled products is disallowed, apparently under the premise that recovery is available for decontrolled products in the free market * * *. Decontrolled products are a mixed bag of premium products (waxes) and low-value by-products (petroleum coke) and decontrol may benefit or penalize an individual refiner depending upon its mix of decontrolled products. To correct this apparent inadvertent potential discrimination, we suggest that the cost pass-through formula contain a provision to include the total of crude oil related pass-through costs to permit the actual recovery on decontrolled products. This could be accomplished within the spirit of these proposed regulations by including decontrolled product volume in the vn definition but then require that decontrolled product prices above the May 15, 1973 price be subtracted (similar to carbon black oil provision) from total allowable pass-through.

For these reasons and the reasons set forth in our petition, the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

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